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In the Supreme Court of the United States

October Term, 1984

THE STATE OF OHIO,
Petitioner,

vs.

KATHERINE LUCK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

I. Whether a pre-indictment delay, not caused by the State to gain a tactical advantage, and which does not cause actual and substantial prejudice to an accused who has confessed, violates an accused's Fifth and Fourteenth Amendment rights to due process.

II. Whether a confession, volunteered by a guilt-ridden accused, to a police officer, in order to unburden her conscience, after having been advised of her rights three times, constitutes a violation of her Fifth and/or Sixth Amendment rights to the U.S. Constitution.

III. Whether a confession, initiated by an accused who has waived her right to counsel, is admissible regardless of an attorney's attempt to contact the accused.

IV. Does a police officer have an obligation to notify an accused of an attorney's attempt to contact her where the accused waived her right to an attorney, was given free use of telephone facilities, and was not deprived of her right to contact anyone she chose at any time?

V. Is it a violation of an accused's Sixth Amendment right when a police officer fails to notify the accused of an attorney's phone call made prior to the accused's self-initiated confesson, when the accused waived her right to counsel, did not ask for an attorney, did not ultimately retain the attorney who called, and was given every opportunity to contact anyone she chose?

VI. Should *Brewer v. Williams*, 430 U.S. 387 (1977) be reversed?

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PETITION FOR A WRIT OF CERTIORARI
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The Prosecuting Attorney of Cuyahoga County, Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered in this proceeding on December 31, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, Eighth District, is unreported, but is printed in the Appendix, *infra*, p. A17.

The opinion of the Ohio Supreme Court is reported at 15 Ohio St. 3d 150 and printed in the Appendix, *infra*, p. A1.

JURISDICTION

The judgment of the Court of Appeals, Eighth District, was entered on November 23, 1983. The decision of the Ohio Supreme Court was entered on December 31, 1984, and this petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 30, 1967, Helen Marie Tietjen was murdered in her apartment in Lakewood, Ohio. On March 16, 1983, the defendant, Katherine Luck, was arrested pursuant to an indictment charging her with Murder in the First Degree while Perpetrating a Robbery. Katherine Luck voluntarily confessed to murdering Mrs. Tietjen, describing the incident as only the murderer could.

On August 4, 1983, the trial court granted a defense Motion to Suppress Katherine Luck's confession; and also granted a defense Motion to Dismiss the Indictment because a trial would violate her right to a fair trial under the Due Process Clause of the Fourteenth Amendment.

The State appealed both rulings to the Ohio Court of Appeals. The Ohio Court of Appeals upheld the trial court's rulings.

The State filed a Memorandum in Support of Jurisdiction with the Ohio Supreme Court. Jurisdiction was granted and the State appealed both rulings to the Ohio Supreme Court. On December 31, 1984, the Ohio Supreme Court upheld the decision of the Court of Appeals.

Now, the State files this Petition for Writ of Certiorari asking the Supreme Court of the United States for permission to file an appeal.

STATEMENT OF FACTS AND LAW

General Facts Regarding Murder

In 1966, Helen Marie Tietjen became acquainted with Katherine Luck (known at that time as Katherine Drummond) by Katherine Luck's relationship with a friend of Mrs. Tietjen's, Edward Henry. At that time, Mrs. Tietjen was 51 years old, divorced, with two children; Katherine Luck was 25 years old; and Edward Henry, single, age 57. Unknown to Mrs. Tietjen and Mr. Henry, Katherine Luck was a paramour of a procurer named Larry Cassano.

Mrs. Tietjen was known to wear her expensive rings and jewelry in public, and did so often when she and her date socialized with Mr. Henry and Katherine Luck. Mr. Henry and Katherine Luck also dined with Mrs. Tietjen and her date at Mrs. Tietjen's apartment.

On the morning of October 30, 1967, Nancy Tietjen and her brother left their apartment to go to work. At that time, Mrs. Tietjen had risen and was preparing for her day. No visitors were expected by the Tietjens that day. When Nancy left the apartment, the living room was not disturbed; there was no beer bottle or glass on the living room coffee table, nor was there a blood-stained cloth under the living room sofa. The apartment walls were clean and devoid of any blood stains. Mrs. Tietjen's jewelry was intact in her bedroom. (It should be noted that Mrs. Tietjen was still recovering from an operation performed on an area near her larynx, which made it difficult for her to speak; and that no one in the Tietjen household smoked Marlboro cigarettes.)

Sometime during the morning of October 30, 1967, after 8:00 a.m. (when Nancy left for work), Katherine

Luck and Larry Cassano arrived at Mrs. Tietjen's apartment to rob her of her jewelry. It is presumed that Luck and Cassano arrived sometime after 11:00 a.m.

(At the time of indictment—1983—the State was not aware of Cassano's participation in the robbery. Other than Luck's confession, there is no evidence indicating he was involved in the robbery; and Luck's confession indicates unequivocally he was not involved in the murder.)

At about 12:15 p.m., Nancy Tietjen telephoned her mother. Her mother answered and talked to Nancy, but did not mention that Katherine Luck was at the apartment. (In her confession to Detective Robert Holmok of the Lakewood Police Department, Luck mentioned that she was present when Nancy called (page 8 of Holmok's report, State's Exhibit 5). Nancy's phone call was one fact used to determine the approximate time of death. Only the murderer would know that Nancy called because that fact was only known by the police, Nancy, and anyone present in the Tietjen's apartment when Nancy made the call.)

Shortly after that phone call, Mrs. Tietjen realized that Luck had come to rob her. She became excited and upset when she looked in her bedroom and discovered her jewelry was stolen, and began to accuse Katherine Luck.

Luck proceeded to beat, shoot and stab Mrs. Tietjen to death. The hallway walls were spattered with blood. Mrs. Tietjen's hands were scarred with defensive wounds. In the kitchen where she eventually succumbed, the cabinet doors were blood-stained, and one door was newly damaged by some object striking the door which was in the vicinity of Mrs. Tietjen's head. She was shot once in the back. One of the numerous stab wounds with a butcher knife was so deep, that the point of the knife

penetrated the full depth of her chest, went into her backbone, and the tip broke off in her spine.

It is presumed that Luck injured herself while stabbing Mrs. Tietjen because under the living room sofa the police discovered a large blood-stained cloth, referred to by Luck in her confession to Detective Holmok (page 9 of Holmok's report, State's Exhibit 5). The blood type on the cloth was type "O", the same as Katherine Luck's.

After murdering Mrs. Tietjen, Luck took a lady's red coat, belonging to Mrs. Tietjen's friend, and left the apartment. The coat was in the apartment when Nancy Tietjen left for work, but was never recovered. Luck proceeded to the location of the Blue Fox Restaurant, about two blocks away, where she caught a cab. This was about 12:50 a.m., approximately one-half hour after Nancy called her mother.

The cab driver, Robert Solon, was parked at the cab stand in front of the restaurant when Luck walked up to the cab and got in. She just directed him to the vicinity of Southgate Shopping Center, located in a suburb south of Cleveland. She then directed him to a location in a southeast suburb of Cleveland, Maple Heights; and then to the address of Dr. Anthony Catalano. When they arrived at Dr. Catalano's, the cab driver noticed that she refused to take her hands out of her coat pockets, and he had to get out and open the back door of the cab for her. A short while later, Dr. Catalano came out and paid the fare.

When interviewed in 1967, Robert Solon identified a photo of Katherine Luck (then Drummond) as the fare he had driven to Dr. Catalano's house. When reinterviewed in 1983, he again identified the same photo of Katherine Luck. To this day he is still able to, and does,

identify the same photo of Katherine Luck as he did in 1967 (see Tr. 10). Although, due to the passage of time, he says he could not identify her in person today because her facial features have changed considerably.

About 4:45 p.m., Nancy Tietjen returned home from work and found her mother lying on her back in a large pool of blood in the apartment kitchen. The police were called and the investigation commenced.

The Lakewood, Ohio police responded immediately. The investigation revealed there were no visible signs of forcible entry, and that Mrs. Tietjen was beaten, shot and stabbed to death. Her expensive jewelry was missing (never recovered). A beer bottle with Luck's fingerprints on it was found on the living room coffee table. A blood-stained cloth was found under the living room sofa. Marlboro cigarette butts were found in an ashtray.

Eventually, the investigation focused on Luck as the murderer. She denied ever being in the apartment that day. At the time she was interviewed, she wore elbow length gloves, and refused to remove them so the police could see if she had any wounds. She also smoked Marlboro cigarettes and put them out in the same crushing manner as those discovered in the Tietjen apartment. (The cigarette butts remaining after the police interview were also confiscated.)

The cab driver identified her, and the trip to Dr. Catalano's house was confirmed.

For some unknown reason, the Lakewood authorities never arrested nor charged Luck. Further, they never notified the Cuyahoga County Prosecutor's Office of the existence of identification evidence (fingerprints); nor did they ever send the results of the investigation to the Prosecutor's Office for presentation to the Grand Jury.

In late 1982, the Cuyahoga County Prosecutor's Office was asked by a Lakewood detective, Robert Holmok, to review the Tietjen murder case. The facts undeniably pointed to Luck as the murderer. In early 1983, the matter was presented to the Cuyahoga County Grand Jury, and the Grand Jury returned an indictment for Murder in the First Degree while Perpetrating a Robbery. (Ohio has no statute of limitations on murder.)

Facts Regarding Arrest of Defendant

On March 16, 1983, Detective Robert Holmok of the Lakewood, Ohio Police Department and other officers arrested Luck at her home in Sheffield Lake, Ohio.

The facts show that the defendant was advised of her Fifth and Sixth Amendment rights at least three times that night, and that each time she knew and understood her rights. When she was arrested at her home at 6:30 p.m. on March 16, 1983, her rights were given to her orally by Detective Robert Holmok in the presence of Capt. Glen Walker of the Lakewood Police Department and a sergeant from the Sheffield Police Department. She indicated that she understood her rights.

At the Lakewood Police Department, her rights were given to her two more times—at 7:14 p.m. and 9:05 p.m. on March 16, 1983. At the second and third advisings, her rights were read to her aloud and she followed the reading on an Advice of Rights form. On each form the defendant wrote the answer "yes"—indicating that she knew and understood her rights; on each form the defendant signed her signature that she knew and understood her rights; and on each form the defendant signed her signature that she voluntarily waived her rights and was willing to make a statement. At each advising, it was

clear that the defendant knew and understood what she was doing and that she voluntarily waived her rights to remain silent and to an attorney, and that she wished to make a statement, especially after the third recitation of rights.

The booking procedure was tape-recorded (State's Exhibit 2). From an examination of the tape, it is apparent that the defendant was clear-headed and lucid in her thinking. Her voice showed no signs of confusion or disorientation. She was aware and alert to all that was happening, and responded to the booking questions positively and firmly.

It is exceptionally significant that during the booking process she asked Ptl. Murray, "Well, don't they ask me questions?" "Well, don't they ever . . . Isn't anybody going to ask me whether I did this thing?" (referring to the detectives).

It was apparent that she was guilt-ridden and conscience-stricken, and that she wanted to talk to any detective in order to ease her conscience. Still, the police did not interrogate her or say anything to encourage a confession.

It was factually established that the detectives never attempted nor intended to take a statement from the defendant. They never asked her any questions nor did they ever attempt to interrogate her about the subject matter of the offense. After her arrest, but prior to her being processed, an individual, who identified himself as attorney Duff, called the Lakewood Police Department and spoke to Holmok. He talked to Holmok about getting bond set for the defendant and asked if Holmok intended to interrogate her. Holmok replied that he had no intentions of interrogating the defendant.

At about 8:30 p.m. March 16, 1983, Detective Robert Holmok asked that the defendant be brought from her cell to the Detective Bureau for additional processing, to include handwriting samples and background information.

After the processing was completed, the defendant asked Detective Holmok a number of questions concerning the murder and about people from her past. She then asked if she could hypothetically explain to Holmok what had happened. Holmok gave the defendant her rights for the third time in three hours. She acknowledged her rights and waived them. Holmok then agreed to listen to her confession. Luck proceeded to tell Holmok how and why she murdered Helen Tietjen.

When the defendant initially asked Holmok to listen to her confession, and after she was given her rights for the third time, she asked him if he knew what happened. Holmok said he did and wrote on a piece of paper: "Helen caught you stealing." He also drew a "Y"-shaped diagram indicating two roads and suggested that one way she could be helped and one way she could not.

After the defendant confessed, he showed her the piece of paper and she had him cross out the word "caught" and inserted the word "accused".

At no time did Detective Holmok ever interrogate the defendant. She did all the talking about how she committed the murder. All Holmok did was listen and answer any question the defendant asked her. This entire incident is fully explained in Detective Holmok's report (State's Exhibit 5).

Throughout her stay at the Lakewood Jail she made phone calls and received calls from her husband. She not only knew she had a right to an attorney, but she even

discussed some attorneys with Detective Holmok. She knew that her husband had contacted an attorney named Michael Duff and still she chose to talk to Detective Holmok. At no time did Detective Holmok interrogate the defendant. All conversation about the murder was initiated by the defendant.

The session ended with Detective Holmok breaking the conversation and telling her she could go get some sleep. She never asked for an attorney nor did she indicate that she wanted to stop talking to Detective Holmok.

The above facts are not controverted or rebutted by any evidence from the defendant. During the motions phase, the defendant never even took the witness stand to deny any of the facts.

Law Regarding Fifth and Sixth Amendments

The law relevant to this issue is most accurately described in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). In *Miranda* at 384 U.S. 436, at 444, the court said: "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody. . .*" (Emphasis added).

The crux of *Miranda* and numerous following cases is that before a statement made by an accused can be used against him, it must first be established that the statement was made pursuant to incustodial police interrogation.

If any one of the three elements—custody, police, interrogation—is absent, then the statement is admissible regardless of whether an accused was informed of his Fifth Amendment rights.

The court in *Miranda* also noted at 384 U.S. 436, at 478:

> ". . . The fundamental import of the privilege is not whether he is allowed to talk to the police without benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" (Emphasis added.)

In *Oregon v. Mathiason,* 429 U.S. 492 (1977), the United States Supreme Court overruled the decision of the Oregon Supreme Court and reinstated the defendant's conviction. In *Mathiason,* the suspect-defendant was told by a police officer to meet him at the police station, which the defendant did. The police officer proceeded to tell the defendant that he was a burglary suspect; the police officer falsely stated that his fingerprints were found at the scene. The defendant confessed; then the police officer gave the defendant his rights and taped the confession.

The United States Supreme Court ruled at 429 U.S. 492, at 493:

> ". . . We think that court (the Supreme Court of Oregon) has read *Miranda* too broadly, and we therefore reverse its judgment."

In *Mathiason*, the defendant was called to the police station, not given his rights, lied to, and still his confession is considered admissible.

In this case, the defendant was arrested, given her rights three times, waived her rights, made and accepted phone calls knowing she had a right to counsel, never invoked her right to counsel, was not interrogated and voluntarily confessed.

The Ohio courts in this case erroneously interpreted the facts in its decision. The Ohio courts agreed the defendant initiated the conversation, and that it was a confession, but rationalized that the conversation met the definition of "interrogation" because it took place in "coercive surroundings". This finding is legally and factually untenable. The court in *Mathiason* said at 495 and 496 relative to the issue of "coercive environment":

> "The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule."

The court concluded that "coercive surroundings" were not a factor in a case where no rights were given. How could the court possibly use that as a basis of suppression where rights were given three times and the defendant not interrogated?

The trial court stated:

> "The testimony shows that the defendant did wish to talk to someone about the case."

The only "someone" the defendant wanted to talk to was a detective. She knew she could have had an attorney, but the facts and the tape recording of the defendant show clearly that she wanted to talk to a detective and not an attorney.

The trial court further noted:

> "The court concedes that Mrs. Luck was anxious to talk. However, this court can never know what defendant Luck would have done if she knew she had an attorney or knew that her attorney advised her against any statements."

It is not the court's duty to speculate on how wise a defendant's decision is. Nor can the court or any defense attorney invoke the defendant's rights. The defendant knew she could have called an attorney for advice but chose not to do so. In fact, she was aware at about 10:00 p.m. on the night of the confession that Mr. Duff was claiming to represent her, but she still chose to continue talking to Det. Holmok for almost four hours. There is certainly no duty on a police officer to stop a person from confessing—whether or not rights are given.

See also: *Phillips v. Attorney General*, 594 F.2d 1288, 1290-91 (9th Cir., 1979) (defendant made inculpatory statement after arrest but before Miranda warnings when police indicated they suspected him of transporting marijuana; statement admissible because volunteered on defendant's own initiative and not in response to police interrogation); *Blockson v. Jago*, 587 F.2d 10, 11 (6th Cir., 1978) (per curiam) (defendant blurted out incriminating statements while under arrest after being asked for name and address; statements admissible because not in response to interrogation); *United States v. Rieves*, 584 F.2d 740, 745 (5th Cir., 1978) (agent told suspect who had invoked right

to remain silent and requested lawyer, that he would inform court of any cooperation on her part; comments did not constitute interrogation so as to render defendant's subsequent statement inadmissible); *Pavao v. Cardwell*, 583 F.2d 1075, 1077 (9th Cir., 1978) (per curiam) (defendant arrested after high speed auto chase and forced at gunpoint out of car and onto ground; inculpatory statements made without questioning admissible); *United States v. Fritz*, 580 F.2d 370, 377 (10th Cir.) (en banc) (defendant's "spontaneous utterances" made while en route to county jail admissible because not in response to interrogation), *cert. denied*, 439 U.S. 947 (1978); *United States v. Jordan*, 570 F.2d 635, 643 (6th Cir., 1978) (district court's refusal to exclude suspect's statements that drugs discovered in his house belonged to him and not his common-law wife not clearly erroneous; agent's showing suspect copy of warrant naming his pregnant common-law wife and stating that they intended to arrest her not interrogation); *United States v. Martinez*, 565 F.2d 911, 912 (5th Cir., 1978) (per curiam) (defendant's "yeah" following arresting agent's remark during police station processing that some drug dealers take a long time to get caught and that defendant's day had come admissible because voluntary, unsolicited, and not in response to interrogation).

The facts in this case show that the defendant was in police custody but was not being interrogated. If an accused wishes to make a statement not prompted by police interrogation, there is no law that says a police officer cannot just sit and listen. This goes to the very nature of the accused's voluntary actions; whether or not they are tactically wise.

The defendant voluntarily made a statement unmotivated or promoted by any interrogation. Since these facts

show there was no interrogation, the defendant's statement is admissible against her because it was her voluntary choice to make the statement. Her statement would be admissible even if she had never been given her Fifth Amendment rights because she voluntarily made a confession that was not instigated by police interrogation.

Finally, the Ohio courts based their decision on *Brewer v. Williams,* 430 U.S. 387 (1977). Williams was an escapee from a Missouri mental institution who had told the police he did not want to talk at that time, but would tell them everything once they reached Des Moines and he talked to his attorney. Detective Cleatus Leaming of the Des Moines Police Department gave his "Christian burial speech" to Williams in the presence of Williams' attorney prior to leaving Davenport for Des Moines. About two hours later, without any prompting from Leaming, Williams began talking about the murder, confessed, and led the police to the body.

Mrs. Luck is a 41 year old intelligent person who was fully aware of all her rights and who specifically chose to converse with and confess to Detective Holmok, as opposed to talking to an attorney. There is no evidence that Mrs. Luck even wanted to talk to an attorney, even though she and Holmok discussed a number of attorneys who could represent her for trial.

She was repeatedly told she had a right to an attorney and she chose not to talk to an attorney each time. She never asked to be counseled by an attorney, nor did she want an attorney present when she talked to Holmok. In fact, she ultimately never did retain attorney Duff, nor did she ever seek his assistance in any matter connected with this case. Attorney Duff never did anything to represent Mrs. Luck, nor did Mrs. Luck ever attempt to have him represent her, or ratify any of his actions.

The State contends that Holmok's reply to Luck's questioning (not prompted by Holmok), and his diagrams are not interrogation, and that Mrs. Luck's confession is admissible. Further, Mrs. Luck's confession is voluntary, irrespective of her Sixth Amendment rights because she initiated the conversation that culminated with her confession. Her Sixth Amendment rights were properly observed by the police in that they explained her rights to her and gave her every opportunity to seek counseling. Her volunteering to confess waived all rights.

Based on these facts, the State contends that such comments by law enforcement personnel characterized as "the Christian burial speech" or "the road not taken" are legitimate police tactics that appeal to an accused's finer moral and humane instincts, and that these statements or tactics should not be considered a violation of any constitutional rights. In short, *Brewer v. Williams, supra,* should be overruled.

What Detective Cleatus Leaming did in *Brewer* and what Detective Robert Holmok did in this case are examples of good, sophisticated police work and should be legally recognized as constitutionally sound police tactics.

Law Regarding Fifth and Fourteenth Amendments—Due Process

Generally, to determine whether a due process violation has occurred, the Supreme Court must determine in light of the existing law and facts whether the defendant has factually proven actual and substantial prejudice *and* whether the delay was deliberately caused by the prosecution in order to gain a tactical advantage.

Speedy trial is not an issue here because the State acted on these facts as soon as they were made available

to the Prosecutor's Office; and the trial date was timely set.

In *U. S. v. Marion*, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971), the Supreme Court ruled on issues of speedy trial and due process. At 404 U.S. 307, at 315, the Court stated:

> ". . . and the Court of Appeals that have considered the question in constitutional terms *have never reversed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved.*" (Emphasis added.)

The Court in *Marion* ruled at 325 and 326, relevant to the Fifth Amendment due process clause:

> ". . . No actual prejudice to the conduct of the defense is alleged or proved, and there is *no showing that the Government intentionally* delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature. Reversed."

On the issue of due process, *Marion* stands for the proposition that the defense must establish actual and substantial prejudice caused by the delay, *and* that the State intentionally caused the delay to gain some tactical advantage.

While reviewing the facts and law relevant to this case, the State asks the Supreme Court that it be mindful that the legislature of the State of Ohio has expressly stated that murderers not ever be immune from prosecution by its enactment of Revised Code, Section 2901.13—Limitation of Criminal Prosecutions, in particular, paragraph (A)(1). Prior to Revised Code, Section 2901.13, there was no statute of limitations as to felonies.

The defendant alleged—but did not prove—that the delay resulted in the loss of physical evidence, the unavailability of witnesses, and an impaired memory. None of the above have been substantiated in fact. The defendant never took the stand to present any evidence on these issues; moreover, she has not even alleged that this delay was caused by the State in order to gain a tactical advantage.

The Supreme Court further elaborated on its *Marion* decision in *U. S. v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977), when it said at 431 U.S. 783, at 790:

> "Thus Marion makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."

In *Lovasco*, at 786, "The Government made no systematic effort in the District Court to explain its long delay."

It is apparent that the Supreme Court is weighing the defendant's right to due process against society's right to try the defendant, and finding that it is more consistent with due process and justice to permit the State to try an accused.

In *Lovasco,* the prejudice alleged by the defendant was that during the delay two material witnesses died. The Supreme Court recognized that lengthy delays may prejudice a defendant, but still ruled in *Lovasco,* at 796, that:

> "We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time."

The *Marion* and *Lovasco* decisions were followed by *U. S. v. Doe* (10th Cir., 1981), 642 F.2d 1206. In *Doe,* the defendant argued that the lengthy delay caused him prejudice because witnesses were scattered and unavailable for trial. The Court did not accept the argument saying at 1208:

> ". . . there was no indication of how any witnesses would have aided the defense. . . Even if there was proof of actual prejudice, however, appellant has failed to explain how the prosecution intentionally delayed for tactical advantage. . ."

The Court also ruled that the mere passage of time per se does not give rise to a constitutional violation.

Basically, the Court in *Doe* reiterated the law in *Marion* that actual and substantial prejudice must be proven by the defendant *and* that the delay was purposely designed to gain tactical advantage.

Lovasco was followed in *U. S. v. Mills* (9th Cir., 1981), 641 F.2d 785, where the Court ruled at 788:

> "Pre-indictment delay may result in a denial of due process. *Lovasco, supra,* 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752; *U. S. v. Swacker,* 628 F.2d 1250, 1254

(9th Cir., 1980). To block a prosecution on this basis, a defendant must initially show actual prejudice resulting from the delay. *Swacker, supra; U. S. v. Stone,* 633 F.2d 1272, 1274 (9th Cir., 1979). The proof must be definite, not speculative. *Swacker, supra; U. S. v. Tousant,* 619 F.2d 810, 814 (9th Cir., 1980).

Prejudice is a necessary but not sufficient element of a due process claim."

The Court in *Mills* ruled that a showing that witnesses have been lost or that evidence has become unavailable due to the delay suggests actual prejudice. But it is not enough to assert that potential witnesses have been lost. A defendant must identify the witnesses, relate the substance of their testimony, and efforts made to locate them. There is no evidence in this record that the defendant is prejudiced by the loss of Dr. Catalano or Larry Cassano. There is no evidence of what either would have said or just how their loss adversely and substantially affects the defendant's right to a fair trial.

That missing witnesses might have been useful does not show actual prejudice. *U. S. v. West,* 607 F.2d 30 (9th Cir., 1979). Nor does the claim that the witnesses' memories have dimmed without proof of impairment constitute actual prejudice. *U. S. v. Rogers,* 639 F.2d 438 (8th Cir., 1981).

Case law is replete with instances where a defendant has alleged a due process violation caused by preaccusation delay and where the Courts have ruled that such allegations are either unsubstantiated, or, if substantiated, the defendant failed to show or allege that the delay was deliberately caused by the prosecution to gain a tactical advantage.

In addition to the above, see also:

U. S. v. Cederquist, 641 F.2d 1347 (9th Cir., 1981): Defendant must establish actual prejudice by definite proof that the loss of evidence is prejudicial to him; that the loss of witnesses or documentation has actually impaired his ability to meaningfully defend himself.

U. S. v. Saunders, 641 U.S. F.2d 659 (9th Cir., 1981): The defendant has the burden of showing actual prejudice due to the death of a potential witness, and to show that the prejudice was definite and not speculative.

U. S. v. Nixon, 634 F.2d 306 (5th Cir., 1981): Defendant failed to show the delay caused substantial actual prejudice and that such delay was deliberately caused by the prosecution to gain a tactical advantage.

U. S. v. Surface, 624 F.2d 23 (5th Cir., 1980): A bald and unsupported assertion that a missing witness would have testified to the benefit of the defendant, but for the delay, was ruled to be not supported by any extrinsic evidence and such assertion was not an adequate showing of actual prejudice.

Relevant Ohio cases involving lengthy delays from the date of the crime to indictment, wherein the indictments were not dismissed are:

Case No.		Date of Crime	Date of Indictment
CR 29398	State v. Steele	1969	1977
CR 26209	State v. Robbins	1968	1976
CR 178218	State v. Kilbane et al.	1968	1983

Also see, *People of N.Y. v. Provenzano,* 50 N.Y.2d 420, 429 N.Y.S.2d 562 (1978), where defendants were tried and convicted of murder in 1978 for a crime committed in 1961. Indictment was had in 1976.

The U. S. Supreme Court recognized the uniqueness and rarity of this issue when it said in *Lovasco,* 431 U.S. at 796:

> "In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. 404 U.S. at 324, 30 L. Ed. 2d 463, 92 S. Ct. 455. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We, therefore, leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases."

The defendant has failed to establish a factual basis for the consideration of this motion at the trial level. No evidence was presented to indicate to the trial court just what the testimony of Larry Cassano or Dr. Catalano would have been, or just how their absence prejudices the defendant. In fact, according to the defendant, Cassano was her accomplice; his alleged testimony could not possibly help the defendant. There was no testimony before the trial court that sustained the defendant's burden of proving actual and substantial prejudice to her right to a fair trial; and there was no allegation that the State deliberately caused the delay.

It is inconceivable that any court would seriously contend that the State deliberately caused a 15 year delay to gain a tactical advantage. In almost every case a delay is detrimental to the State, not the defendant.

The testimony of Detective Holmok established that the defendant's memory is very good; that she recalled vividly how and why she murdered Helen Tietjen; and that there was no defense to her actions.

The defendant has admitted murdering Mrs. Tietjen during a robbery of her jewelry. The physical and circumstantial evidence against the defendant is insurmountable. Her statement to Detective Holmok is a confession of guilt that contains no defense. There is no legal reason why the State should not be permitted to try Katherine Drummond Luck.

The State contends that a good-faith error in judgment on the part of the detective in charge of the case in 1967 made him believe that there was insufficient evidence to take this case to the County Prosecutor. Society should not be punished because of an investigator's honest opinion as to the weight of the evidence—especially when the murderer has admitted guilt.

REASONS FOR GRANTING WRIT

This case raises serious constitutional issues concerning the interpretation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. It is imperative that the Supreme Court of the United States grant this Petition for Writ of Certiorari in order that the State of Ohio may appeal on issue raising such questions as:

> Does the mere passage of time from the date of the offense to the date of indictment, ostensibly caused by a police officer's good-faith error in judgment, where the accused has admitted guilt and failed to prove any prejudice caused by the delay, deprive an accused of his due process right to a fair trial?
>
> Where an accused initiates conversation and persists in talking to a police officer, is it error for a police officer to respond to an accused's questions and encourage the accused to continue talking?
>
> Where an accused, of her own volition, asks to speak to a police officer, who advises her of her rights, initiates a conversation in which she confesses to the crime charged, is there any violation to any of her constitutional rights if the police officer just listens to her confession and does not interrogate her?
>
> What police action or conversation constitutes "interrogation" in a situation where a guilt-ridden accused initiates a conversation wherein she confesses guilt?
>
> Where an accused asks a police officer to hear her confession, is there any obligation on the part of the police officer to advise her of any rights?

The State of Ohio contends the above issues, and others, raised by the facts in this case warrant the United States Supreme Court granting the Petition for Writ of Certiorari.

The purpose of advising an accused of their constitutional rights is to enable them to voluntarily decide whether or not they wish to talk to the police, and to seek counseling, if they so desire. *Miranda, supra*, specifically notes that volunteered confessions are admissible, regardless of whether or not rights are given.

The U.S. Constitution protects both individual rights and social rights. Where, due to an error in judgment, a period of time lapse between the date of the crime and indictment, and the passage of time does not adversely affect an accused's right to a fair trial, then there is no violation of the accused's right to due process; especially when the accused confesses, and the direct and circumstantial evidence is overwhelming.

The State suggests that the writ should be granted because the rulings of the Ohio courts have resulted in a gross miscarriage of justice by denying the State the right to try a guilty person. The lapse of time due to a police officer's error in judgment, which does not adversely affect an accused's right to a fair trial, should not be the basis for punishing the State or society. If guilt were in doubt, it is conceivable that the accused might not be able to get a fair trial. But, considering this fact situation, how can Mrs. Luck not get a fair trial?

The Ohio courts have misinterpreted the law relevant to an accused's Fifth and Sixth Amendment rights, and disregarded the constitutional protection afforded victims and society. For all of the above reasons and law, the State asks that this petition be granted.

CONCLUSION

Pursuant to defense motions, the trial court dismissed the indictment, ruling that Luck's constitutional right to due process had been violated; and suppressed her confession, ruling that her Fifth and Sixth Amendment rights were violated.

The trial court's ruling was upheld by the Ohio Court of Appeals and the Ohio Supreme Court with both appellate courts substantially adopting the trial court's reasoning.

Katherine Luck brutally murdered Helen Marie Tietjen. The direct and circumstantial evidence and Luck's confession conclusively and undeniably prove that Katherine Luck is guilty of Murder in the First Degree while Perpetrating a Robbery, just as she is charged. She has no defense and there are no mitigating factors. Under this factual situation, it is unreasonable to suggest, as the Ohio Supreme Court has, that a guilty person cannot get a fair trial. Balancing the equities of a defendant's rights versus society's rights, it is eminently more just to permit the State of Ohio to try Katherine Luck, using her confession, than it is to release a murderer untried.

A review of the opinions of the trial court and Ohio Supreme Court, in light of the record and law, can lead to but one conclusion: that the trial court erred in suppressing the defendant's confession, and erred in dismissing the indictment for want of due process.

The State of Ohio requests that this Petition for Writ of Certiorari be granted in order that these serious constitutional issues may be appealed.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided December 31, 1984)

No. 84-138

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellant,

vs.

KATHERINE DRUMMOND LUCK,
Appellee.

15 Ohio St. 3d 150

Criminal law—Right to assistance of counsel denied, when —Unjustifiable delay between offense and indictment exists, when.

O.Jur 3d Criminal Law §§ 172, 181, 329, 337.

1. A defendant in a criminal prosecution is deprived of the right to the assistance of counsel in violation of the Sixth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, when a police officer elicits statements from the defendant after (1) refusing to allow an attorney, retained pursuant to the defendant's request, to speak to the defendant on the telephone, (2) failing to inform the defendant either of the attorney's retention by her husband or of the at-

torney's telephone calls to the police station on her behalf, and (3) assuring the defendant's attorney that the police will not talk to or interrogate the defendant.

O.Jur 3d Criminal Law § 284.

2. An unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

(No. 84-138—Decided December 31, 1984.)

APPEAL from the Court of Appeals for Cuyahoga County.

On or around October 30, 1967, Helen Marie Tietjen was killed in Lakewood, Ohio, and the Lakewood Police Department began an investigation into the cause of her death. This investigation resulted in the collection of a variety of real evidence from the crime scene and in the conduct of numerous interviews with potential witnesses and suspects. The defendant-appellee herein, Katherine Drummond Luck, was one of the suspects interviewed in late 1967 and early 1968.

After an initial period of active investigation, the Lakewood Police Department was unable to gather any new evidence, and neither the police nor the prosecutor took any official action on the Tietjen case for a period of approximately fifteen years. Then for reasons that are not entirely clear from the record, the Cuyahoga County Prosecutor's office turned its attention to the Tietjen case.

On March 15, 1983, the prosecutor sought and obtained a secret indictment against Katherine Luck for the murder of Helen Tietjen. The following day at approximately 6:30 p.m., Luck was arrested at her home in Sheffield Lake, Ohio by Captain Glen Walker and Detective Robert Holmok of the Lakewood Police Department and Sergeant Ezso of the Sheffield Lake Police Department.

At the time of her arrest, Mrs. Luck asked for permission to call her husband on the telephone. The arresting officers agreed to this request, and, according to the police report, Detective Holmok advised the defendant of her rights so that she would understand "that anything she might say to her husband * * * could be used against her in court." Mrs. Luck was unable to contact her husband, but she left a message for him to return her call. After a short period during which Mrs. Luck was allowed to change from her robe and slippers into street clothes, Mr. Luck returned the call. Mrs. Luck then informed her husband that she was being arrested for murder and she requested that he contact an attorney for her.

The police report indicates that while speaking to her husband and, later, while being transported to the Lakewood Police Station, Mrs. Luck became physically ill and vomited. Upon her arrival at the police station, Mrs. Luck provided Patrolman Murray of the Lakewood Police Department with basic information for her "booking record," and she signed both an "Advice of Rights-Adult" and "Waiver of Rights." This "booking procedure" began at approximately 7:10 p.m. and was completed by about 7:30 p.m. Mrs. Luck was then placed in a cell to await further "processing."

At 8:13 p.m., attorney Michael Duff, who had been retained by Mr. Luck, telephoned the Lakewood Police

Department. The record reveals that this call lasted for one minute, with subsequent calls occurring as follows: (1) 8:14 p.m.—five minutes, (2) 8:37 p.m.—three minutes, (3) 8:41 p.m.—three minutes, and (4) 10:22 p.m.—two minutes. Apparently, in all but the 8:13 p.m. call, Duff spoke with Detective Holmok. Duff informed Holmok that he was representing Mrs. Luck, and he asked to speak to her. Holmok refused this request on the ground that Luck was "in lock-up" and could not come to the phone. Duff asked Holmok if Mrs. Luck had made any statement, and Holmok said that she had not. Duff also asked the detective to not question Mrs. Luck, and he requested that Mrs. Luck be informed that he had been retained as her lawyer by Mr. Luck. Holmok indicated that Mrs. Luck had not been questioned and he assured Duff that he had no intention of talking to Mrs. Luck.

At approximately the same time that Duff first called the Lakewood Police Station, Holmok began "processing" Mrs. Luck by taking her fingerprints and obtaining a handwriting sample. After "processing," at approximately 9:00 p.m., Mrs. Luck apparently expressed a desire to talk to Holmok; and, after signing both an "Interrogation: Advise [*sic*] of Rights" and "Waiver of Rights," Mrs. Luck began discussing how she came to know Helen Tietjen. At one point Mrs. Luck asked Holmok if he knew what the events were that had lead up to Tietjen's death. Holmok said that he thought he knew what had happened, and that he would write his theory down on a paper and then see if his theory "agreed" with that of Mrs. Luck.

The "conversation" between Mrs. Luck and Holmok continued for approximately five hours, with Holmok at one point drawing a picture of two roads—one of which was a path whereon he could offer her help, the other

a path where he could provide no help. Holmok agreed at the hearing on defendant's motion to dismiss that this demonstration was to encourage Mrs. Luck to unburden herself. At no time in this five-hour period did Holmok inform Mrs. Luck that her husband had retained an attorney for her; and, it was not until she had described her role in the death of Tietjen and given what amounted to a full confession that Mrs. Luck called her husband and learned that Duff had been retained as her lawyer.

Prior to trial, counsel for defendant Luck filed motions to suppress and to dismiss the indictment. On July 19, 1983, a hearing on these motions was held in the Court of Common Pleas of Cuyahoga County; and, on August 4, 1983, the court granted both motions. The court of appeals affirmed the judgment of the trial court.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

SWEENEY, *J.* The central issue in this case is whether the trial court properly granted the defendant's motion to dismiss the indictment. The arguments of defendant's counsel in support of the motion to dismiss are (1) that the fifteen-year delay between the commission of the offense and the defendant's indictment therefor has deprived the defendant of her right to a speedy trial under the Ohio Constitution, and (2) that this delay has resulted in actual prejudice to the defendant, thereby violating her right to due process of law.

The defendant's first argument relies heavily on *State v. Meeker* (1971), 26 Ohio St. 2d 9 [55 O.O.2d 5], in which we held at paragraph three of the syllabus that "[t]he [state and federal] constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after in-

dictment." Although the Supreme Court subsequently ruled that the speedy trial guarantee under the Sixth Amendment to the United States Constitution has no applicability to pre-indictment delays, *United States v. Marion* (1971), 404 U.S. 307, the defendant urges that *Meeker* still is controlling insofar as it applies the speedy trial guarantee under Section 10, Article I of the Ohio Constitution to pre-indictment delay. We agree that *Meeker* was not nullified in its entirety by *Marion*, but we believe that in light of *Marion* and its progeny, our holding in *Meeker* is viable only insofar as its application is limited to cases that are factually similar to it.

In *Meeker*, the defendant committed acts at the same time and place which would have constituted four separate offenses; and, in June 1963, the state knowingly chose to indict the defendant for only one of those four possible offenses. When the defendant's conviction on the 1963 indictment was overturned by a post-conviction order in 1969, the state obtained another indictment charging the defendant with the three other crimes that were committed in 1963. This conduct, which was found to violate the defendant's right to a speedy trial, is distinguishable from the facts of the instant case.

The defendant in *Meeker* initially was indicted in 1963 for one of four offenses that arose from a single sequence of events. His second indictment in 1969 was based upon the three other offenses that arose from that same sequence of events. The defendant's right to a speedy trial under the Ohio Constitution was violated in *Meeker* because the defendant's initial indictment encompassed the same events that were the basis of his second indictment, and the delay in commencing prosecution for the offenses described in the second indictment occurred *after the defendant had already been indicted* for an offense arising from the same sequence of events.

The defendant in the instant case was never indicted for any offense prior to 1983. Therefore, because the defendant herein was not the subject of any official prosecution until 1983, the delay between Tietjen's death in 1967 and the commencement of prosecution in 1983 is not protected by the speedy trial guarantee contained in Section 10, Article I of the Ohio Constitution. The defendant's first argument in support of her motion to dismiss the indictment is therefore without merit.

The second argument offered in support of the defendant's motion to dismiss is that the fifteen-year delay between the offense in question and the commencement of prosecution therefor caused substantial prejudice to the defense and thereby violated the defendant's right to due process. The United States Supreme Court noted in *Marion, supra,* at 324, and later in *United States v. Lovasco* (1977), 431 U.S. 783, at 789, that pre-indictment delay resulting in actual prejudice to a defendant "makes a due process claim concrete and ripe for adjudication." The court also made clear, however, that proof of actual prejudice, alone, will not automatically validate a due process claim, and the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay. *Lovasco, supra,* at 789-790.

The prejudice claimed by defendant Luck to have resulted from the pre-indictment delay in this case consists of the following:

(1) The deaths of two key witnesses, Larry Cassano and Dr. Catalano. Catalano allegedly treated Luck for an injury to her hand on or around October 30, 1967. Cassano was an acquaintance of the defendant and an original suspect in the Tietjen murder case, who, according to Luck's confession to Holmok on the night of her arrest, was present at Tietjen's apartment at the time that she was killed.

(2) The fading of memories and changes in appearance. Specifically, a taxi driver who identified the defendant in 1967 (from a 1962 photograph) as having been a passenger in his cab on October 30, 1967, is no longer able to identify the person who rode in his cab.

(3) The loss of evidence. All of the tape recorded interviews with potential witnesses and suspects that were compiled by the Lakewood Police Department in 1967-1968 have been destroyed. Transcripts of these interviews do not exist.

The defendant urges that the foregoing enumeration of prejudicial factors, when viewed in light of the state's reason for the delay in prosecution of the instant case, warrants dismissal of the indictment on due process grounds. We are unable to reach this conclusion, however, without first determining whether the trial court properly suppressed the defendant's post-indictment confession. Defendant's counsel argues that the alleged confession in this case has no bearing on defendant's motion to dismiss, because this motion is based on the prejudice to the defendant that resulted from *pre*-indictment delay. This argument is flawed, however, because the due process protections afforded in pre-indictment delay cases are protections against the prejudice that a defendant will suffer *at trial.* See *United States v. Marion, supra,* at 326; see, also, *United States v. MacDonald* (1982), 456 U.S. 1. Thus, the prejudicial factors listed above must be balanced against the other evidence—including the defendant's post-indictment confession—in order to determine whether actual prejudice will be suffered by the defendant at trial.

The "confession" in the instant case consists of statements made to Holmok by defendant Luck on the day of her arrest. Appellee asserts that all of these statements

must be suppressed because they were obtained by Holmok as a direct result of the violation of Luck's right to the assistance of counsel under the Sixth Amendment to the United States Constitution. The trial court, after "viewing the entirety of * * * [the] circumstances," concluded that the defendant's right to counsel had been violated and granted the defendant's motion to suppress. We are in complete agreement with the trial court's determination.

As set forth in the facts of this case, above, defendant Luck, immediately after her arrest, requested her husband to contact an attorney on her behalf. Holmok, who was one of the arresting officers, was well aware of Mrs. Luck's request when he later accepted Duff's phone calls at the Lakewood Police Station. Holmok told Duff that he could not speak to Mrs. Luck on the phone; and, despite his knowledge of Luck's desire to retain counsel, Holmok deliberately elicited incriminating statements from Luck without telling her that her husband had retained Duff as her attorney.[1] This behavior, when coupled with Holmok's assurances to Duff that he would not talk to or interrogate Mrs. Luck, amounts to active deception that is clearly violative of Luck's right to counsel.

The state argues, in effect, that Holmok's conduct is not relevant to the admissibility of the statements in question because Luck waived her right to counsel both during her "booking" and immediately after her "processing." This argument is without merit. The review required by

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1. As discussed in the facts of this opinion, Detective Holmok, by his own testimony, was more than a passive listener in his five-hour "conversation" with Mrs. Luck. Holmok used interrogation techniques designed to help Mrs. Luck "unburden herself" to him, and Luck's most incriminating statements were made subsequent to Holmok's use of these techniques. There is no question that Detective Holmok deliberately elicited a confession from Mrs. Luck. See *Brewer v. Williams* (1977), 430 U.S. 387.

Johnson v. Zerbst (1938), 304 U.S. 458, 464, of "the particular facts and circumstances surrounding * * * [the] case, including the background, experience, and conduct of the accused," reveals that the state has failed to carry its burden of proving that the defendant "knowingly and intelligently" waived her right to counsel. See *Brewer v. Williams* (1977), 430 U.S. 387, at 402-405.

The record reveals that Mrs. Luck was at home with her children when arrested pursuant to an indictment obtained in a secret grand jury proceeding. After her arrest, Mrs. Luck became physically ill and vomited at least twice before her arrival at the Lakewood Police Station. Once at the station, she was "booked" by Patrolman Murray of the Lakewood Police Department. The audio tape of this "booking procedure" reveals that Mrs. Luck was still not feeling well at that time.[2]

During the booking, Murray read an "Advice of Rights"[3] form to Mrs. Luck, and he asked her to mark a

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2. While Patrolman Murray was typing Luck's "booking record," an unidentified male voice said to Mrs. Luck, who had choked during her response to one of Murray's questions, "Are you gonna be sick?" Some inaudible conversation took place and then the male voice, apparently speaking to another individual in the room, said, "Yea, she's gonna get sick again."

3. The "Advice of Rights-Adult" form stated:

"YOUR RIGHTS

"BEFORE we ask you any questions, you must understand your rights.

"YOU have the right to remain silent.

"ANYTHING you say can be used against you in Court.

"YOU have the right to talk to an attorney for advice before we ask you any questions and to have him with you during questioning.

"IF you cannot afford an attorney, one will be appointed for you before any questioning if you wish.

(Continued on following page)

"YES" and sign her name on the form if she understood her rights. Murray then read the "Waiver of Rights"[4] portion of the form to Luck and asked, "Do you understand that?" At that point the following discussion took place:

Luck: "Do I sign there?"

Murray: "It's up to you. Do you understand what it means?"

Luck: "Yea, I understand—"

Murray: "What it means is you've read your statement of your rights up here—"

Luck: "Right, yes—"

Murray: "You understand what your rights are. The right to an attorney. The right to remain silent. The right to talk without an attorney present if you want. OK?

Footnote continued—

"IF you decide to answer questions now, without an attorney present, you will have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to an attorney. Further you have the right to have an attorney present during any questioning.

"DO YOU UNDERSTAND THIS?

"Answer Yes Signature KATHERINE LUCK"

4. The "Waiver of Rights" form stated:

"WAIVER OF RIGHTS

"I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want an attorney at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

"Signature Katherine Luck

"WITNESS Capt. Glen P. Walker

"WITNESS Ptl. Murray

"Time 1916"

That no-one here is forcing you to answer any questions without your attorney here. If you want to answer questions, fine. If you want your attorney, tell him. He'll stop asking the questions. You can call your attorney. That's all it means right there—"

Unidentified male voice: "No-one's forcing you—"

Luck: "No."

Murray: "By any means."

Luck: "Alright."

Murray: "OK."

Luck: "Do you want me to sign it?"

Murray: "If you wish."

Luck: "Do I—?"

Murray: "We can't advise you on what you can and can't do."

Luck: "I don't—I don't know."

Murray: "OK, we're not going to talk to you here anyway. It's just a formality. I have to advise you of your rights. The officer on your right, to the rear of you there, is Captain Walker. The matron here is Matron Keene, and I'm Patrolman Murray the booking officer. Just so you know who we are here, OK?"

Mrs. Luck apparently then signed the "Waiver" form and the booking procedure continued. This signature, however, cannot reasonably be construed as a "knowing and intelligent waiver" of her right to counsel. Mrs. Luck was feeling ill and apparently was highly agitated by the events of the previous hour. Murray's explanation of the import of the "Waiver" form is clearly inadequate, and

Mrs. Luck's hesitation in signing the waiver was apparently eased only after Murray advised her that "we're not going to talk to you here anyway. It's just a formality."

Based on the foregoing, it is indisputable that Luck did not knowingly and intelligently waive her right to counsel prior to the first four calls by Duff to the Lakewood Police Station. For this reason, we need not consider whether Mrs. Luck's second "waiver," which occurred at 9:05 p.m. (after Duff's fourth call but before his fifth and final call), was knowingly and intelligently made. We note, however, that Mrs. Luck was kept "in the dark" as to Duff's calls on her behalf. These calls were placed in response to Mrs. Luck's request for counsel, as made through her husband, and it is highly unlikely that *any* waiver made subsequent to the receipt of these calls by the Lakewood Police Department could be considered to be knowing and intelligent. See *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E. 2d 560.

Thus, having determined that the defendant's confession was obtained in violation of her Sixth Amendment right to counsel, we return to the two-part test required in cases of pre-indictment delay. The prejudicial factors enumerated by defense counsel (the deaths of witnesses, the fading of memories, and the loss of evidence), when balanced against the other admissible evidence in this case, show that the defendant has suffered actual prejudice by the fifteen-year delay in prosecution. Although the state is in possession of circumstantial evidence which may link the defendant to Tietjen's death, it cannot be said that the missing evidence or the dead witnesses would not have minimized or eliminated the impact of the state's circumstantial evidence. Specifically, Holmok's report of his "conversation" with the defendant on the night of her arrest states that Mrs. Luck said that Larry Cassano "was

the one person who could have helped her in this matter but he is dead." Luck further stated to Holmok that Cassano was with her in Tietjen's apartment at the time that Tietjen was killed.

Luck's account of Tietjen's killing, as "confessed" to Holmok, indicates that Tietjen physically attacked Luck and that Tietjen was killed in the ensuing fight. Assuming that this "confession" is an accurate description of the events leading up to Tietjen's death,[5] the defendant Luck is obviously prejudiced by not being able to seek verification of her story from Cassano and thereby establish mitigating factors or a defense to the charge against her.

Having found actual prejudice to the defendant, we turn to the second part of the test set forth in *United States v. Lovasco, supra,* which requires that there be no justifiable reason for the delay in prosecution that caused this prejudice. On this point, the state contends that it appears that there was, in 1967, at least a police error in judgment as to whether this case should have been submitted to the prosecutor's office. Following this alleged "error in judgment," the Lakewood Police Department ceased its active investigation into Tiejen's death. Fifteen years later, the prosecutor sought an indictment based upon the same evidence that had been available in 1968.[6] In fact, the

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5. Our assumption, for the purposes of determining whether the defendant will be prejudiced at trial by Cassano's unavailability as a witness, does not work to the disadvantage of the state, because, in making this assumption, we are accepting "at face value" the most damaging piece of evidence that was obtained by the state against the defendant.

6. At the hearing on the defendant's motions to suppress and dismiss, counsel for the defendant asked Holmok the following question: "But other than the scientific evidence that was gathered at the scene and evaluated then and later, is there anything that has happened in 15 years prior to the indictment that changes the case that they had in 1967?"

Holmok's response to this question was, "No, sir, there is not."

deaths of witnesses and the loss of taped interviews had significantly *reduced* the available evidence by the time that the prosecutor sought the indictment of Mrs. Luck.

This court will not assume the role of the prosecutor to determine when there is sufficient evidence to seek an indictment in every case; and we agree with the rationale of *United States v. Lovasco, supra,* at 792, that it would be unwise to adopt a rule requiring the commencement of prosecution whenever there is "sufficient evidence to prove guilt beyond a reasonable doubt." We believe, however, that a delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant, see *United States v. Marion, supra,* or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased. The length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable.

In the instant case, the state delayed prosecuting the defendant because of an alleged "error in judgment," which lead to a halt in the Lakewood Police Department's active investigation of Tietjen's death. This investigation remained at a stand-still for approximately fifteen years. During that time, witnesses died, memories faded, and evidence was lost. When the state finally decided to commence its prosecution of the defendant herein, it did so without one shred of new evidence—its case being substantially the same as it had been since 1968. For these reasons, we find that the pre-indictment delay in the instant case is unjustifiable.

The delay in the commencement of prosecution against Katherine Luck "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.' * * *" *United States v. Lovasco, supra,* at 790 (citations omitted). We find that this delay is unjustifiable, has resulted in actual prejudice to the defendant, and will effectively deprive the defendant of her right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution should this case proceed to trial.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., W. BROWN, LOCHER, C. BROWN and J. P. CELEBREZZE, JJ., concur.

HOLMES, J., concurs in judgment only.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Dated November 23, 1983)

Nos. 47305 & 47306

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO,
Plaintiff-Appellant,

vs.

KATHERINE DRUMMOND LUCK,
Defendant-Appellee.

JOURNAL ENTRY AND OPINION

DAY, *P.J.*:

In this case, the State appeals the decision of the trial court granting the defendant's motions to suppress evidence and dismiss the indictment. For the reasons adduced below the judgment is affirmed.

I.

More than fifteen years ago (October 1967) Helen Marie Tietjen was killed. The case was investigated by the Lakewood Police Department and Katherine Drummond Luck (defendant) was, among others, a suspect (Tr. 4-5, 11, 16-17). Numerous witnesses were interviewed and real evidence was collected, notably blood and hair samples (Tr. 6-12). However, the case never went beyond this stage and no indictments were sought until

March 15, 1983. On that date the defendant was indicted for murder.[1] The chief investigating officer admitted that no new evidence, unavailable at the time of the original investigation, came to light during the fifteen years intervening between the killing and indictment (Tr. 12, 16).

At about 6:30 p.m., the day after the indictment issued, the defendant was arrested at her home by Captain Walker and Detective Holmok of the Lakewood Police Department and one other officer (Tr. 56). Before leaving the house, she spoke by phone with her husband informing him of her arrest. She asked that he contact an attorney for her; the arresting officers were aware of this (Tr. 71).

She was taken to the Lakewood Police Station and booked. During the booking procedure, she was read an "Advise [sic] of Rights" and waiver form consisting of two sections. She signed both. At about 8:30 p.m., the "processing" of the defendant began. This according to Holmok, involved such things as photographing, fingerprinting, and taking a handwriting specimen from the defendant (Tr. 57). At some point during the processing, the defendant indicated she wanted to talk about the case. Holmok indicated his willingness to listen, and had her sign another waiver of rights form (Tr. 58-59). Five hours later, Holmok had what amounted to a full confession.

Unbeknown to the defendant, however, attorney Michael Duff was trying to contact her.[2] He called the station house that night at least five times.[3] And in all but the original call, he spoke to Holmok (Tr. 77, 107).

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1. The record indicates that two indictments for the same murder were brought against the defendant. This duplication accounts for the two appeals consolidated here. The court below dismissed both indictments. See entry of August 17, 1983.

2. Duff had been retained by the defendant's husband.

3. The calls came at 8:13, 8:14, 8:37, 8:41, and 10:22 p.m.

Duff asked Holmok if he could speak to his client but was refused the request on the ground she was "in lock-up". Duff also asked the detective not to talk to Luck nor ask her any questions about the incident. Holmok indicated he would not, and said she had not made any statements (Tr. 104-105).

Although it seems that at the time of at least three of the calls, Holmok was in the process of talking with the defendant, he saw fit to keep both Duff and the defendant apart and either uninformed or misinformed. The defendant learned independently of Duff's retention from a phone conversation with her husband during the interval covering the police interview. Still Holmok did not feel it necessary to tell her that Duff had called (Tr. 80-82).

The State assigns two errors.

II.

Assignment of Error No. I:

> "The trial court erred in granting the defense Motion to Suppress, where the facts show that the defendant voluntarily waived her rights under the Fifth and Sixth Amendments to the United States Constitution."

A.

Only one constitutional question was presented and decided below (see Finding of Court, 5-6) and accordingly only one will be considered here: whether the defendant validly waived her Sixth Amendment right to assistance of counsel. Moreover, even if considered below, rules announced in *Miranda v. Arizona* (1966), 384 U.S. 436, and its progeny, are designed to secure the privilege against compulsory self-incrimination and would be of little benefit to the State's case. For the Sixth Amend-

ment right to counsel exists independently of the Fifth Amendment. It is not to be confused with the *Miranda* rule entitling a suspect to an attorney to protect against state compulsion or coercion potentially attendant upon custodial interrogation, cf. *Kirby v. Illinois* (1972), 406 U.S. 682, 687-688; *Brewer v. Williams* (1977), 430 U.S. 387, 397-398; *Rhode Island v. Innis* (1980), 446 U.S. 291, 300, n. 4; *United States v. Henry* (1980), 447 U.S. 264, 272-275. Accordingly, the cases cited by the State, in its attempt to show compliance with *Miranda*, and "voluntariness" of the confession, are constitutionally irrelevant in the context here.

B.

The Sixth Amendment[4] to the federal constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

It is settled that an individual's right to counsel attaches with the initiation of adversary judicial proceedings, in this case, the defendant's indictment, *Kirby v. Illinois*, at 688-690; *Brewer v. Williams*, at 398.

In *Massiah v. United States* (1964), 377 U.S. 201, 206, the Supreme Court considered the perimeters of the right to counsel and held:

> "[T]he petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after

4. The Sixth Amendment was made applicable to the states through the Fourteenth Amendment in *Gideon v. Wainwright* (1963), 372 U.S. 335, 342-345.

he had been indicted and in the absence of his counsel." (Emphasis added.)

In the present case then, the question is whether, despite the asserted "voluntariness" of the defendant's confession, it was "deliberately elicited" from her by Det. Holmok. The court below, by necessary implication found that it was. In fact, more than this minimum was found: the court below considered that Holmok's conduct amounted to "interrogation". It is unnecessary to review the latter conclusion. The record justifies a finding of deliberate elicitation.[5] When deliberate elicitation occurs, an interrogation equivalent is present.

Holmok admitted that at one point during the processing, in response to the defendant asking him if he knew what had happened, he said:

> "Let me write down what I think that happened and you tell me and we'll see if I'm right." (Tr. 84-85)

He said that at another time he drew a picture of two roads for the defendant; one represented a path down which he could offer help to her; the other, a route where he could not (Tr. 85). He conceded he was encouraging the defendant to "unburden herself" (*id.*).

As with Det. Leaming's "Christian burial speech" in *Brewer v. Williams,* Det. Holmok's "road not taken" approach was "tantamount to interrogation", *Brewer v. Wil-*

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5. On the constitutional significance of "deliberately eliciting" a statement versus "interrogation", see, Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does It Matter?, 67 Georgetown L. J. 1, cited in *Rhode Island v. Innis,* at 300, n. 4.

liams, at 400.[6] Indeed, the language of *Brewer,* might as well have been written for the present case:

> "There can be no serious doubt . . . that Detective [Holmok] deliberately and designedly set out to elicit information from [the defendant] just as surely as—and perhaps more effectively than—if he had formally interrogated [her]. Detective [Holmok] was fully aware . . . that [the defendant] was being represented . . . [by attorney Duff]. Yet he purposely sought during [the defendant's] isolation from [her] lawyer [ ] to obtain as much incriminating information as possible. Indeed, Detective [Holmok] conceded as much when he testified at [the defendant's suppression hearing]." *Id.,* at 399.[7]

The State contends the defendant waived her right to assistance of counsel. Reliance is put on the forms signed by the defendant.

To prove waiver,

> "[I]t [is] incumbent upon the State to prove 'an intentional *relinquishment* or *abandonment* of a *known* right or privilege.' Johnson v Zerbst, 304 US, at 464, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357." (Emphasis added.) *Brewer v. Williams,* at 404.

In *Carnley v. Cochran* (1962), 369 U.S. 506, 516, the court said:

> "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

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6. Can there be any doubt that the provocative allusion was designed to evoke a response and that it was just as effective, perhaps more effective, than a direct question?

7. Only the bracketed material is paraphrase or adaptation.

In the circumstances of this case, such proof was impossible. Where, as here, defendant in fact had retained counsel who was attempting to offer her advice, the mere waiver form was insufficient. That form only advised the defendant of her right to talk to "*an* attorny" [sic], appointed if necessary (State's Motion Ex. 4). It said nothing about waiving the services of her retained lawyer, about whom she was effectively kept in the dark. For the defendant to "intelligently and understandingly" waive her right to counsel, it was at a minimum necessary for her to be apprised that she in fact had an attorney and that the attorney was actively attempting to intervene on her behalf, cf. *State v. Chase* (1978), 55 Ohio St. 2d 237, 245-248; *Commonwealth v. McKenna* (S. Jud. Ct. Mass. 1969), 244 N.E. 2d 560, 566; *Commonwealth v. Mahnke* (S. Jud. Ct. Mass. 1975), 335 N.E. 2d 660, 678. The failure of Det. Holmok to relay this information to the defendant prior to her "waiver" amounted to nothing less than an intentional interference with the defendant's Sixth Amendment right to consult with counsel.[8]

Assignment of Error No. I is without merit.

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8. Cf.:

"[W]e hold that when Mr. Collins identified himself to Sergeant Gannon and invoked on McKenna's behalf his right to counsel and stated that he wanted to be with McKenna wherever the interrogation was to be held, *it was Gannon's duty immediately so to inform McKenna.* Sergeant Gannon's failure to do so denied rather than afforded McKenna the opportunity to exercise his right to counsel at that stage of the interrogation if in fact the interrogation had commenced. *The legal consequence of the denial of the opportunity to reconsider whether he wanted counsel is that whatever 'waiver' there may have been up to the time Mr. Collins made his request to Sergeant Gannon that he be present became then inoperative.* Conceivably, McKenna might have chosen to go on with the interrogation. But he was entitled to know his of counsel's availability and, with that knowledge, to make the choice with intelligence and understanding." (Emphasis added.) *Commonwealth v. McKenna, supra.*

III.

Assignment of Error No. II:

> "The trial court erred in granting the defense Motion to Dismiss the Indictment, where the facts showed that the defense failed to prove actual and substantial prejudice and failed to show that the State deliberately caused the delay to gain a tactical advantage."

The motion to dismiss was predicated on the 15-year delay between the killing and the defendant's indictment. On both Fourteenth Amendment due process grounds and State constitutional speedy trial grounds the motion was properly granted.

A.

The Supreme Court has held that the Sixth Amendment speedy trial protections do not apply to pre-indictment delays:

> "[E]ither a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States v. Marion* (1971), 404 U.S. 307, 320.

However, pre-indictment delay may amount to a denial of due process of law, *id.*, at 324-326.

In *United States v. Lovasco* (1977), 431 U.S. 783, 796, the court held that an 18-month pre-indictment delay did not deny the defendant due process, despite his being somewhat prejudiced by the lapse of time. In striking the constitutional balance, the court was at pains to accept the lower court's "findings" that the sole reason for the delay was the government's "await[ing] the results of

additional investigation", the purpose of which was to "identify persons in addition to respondent who may have participated in the offenses", *id.*, at 796.[9] This "permissible delay", *id.*, at 795, n.16, weighed against the respondent's weak showing of prejudice, *id.*, at 785-786, and apparently tipped the scales against finding the delay "fundamentally unfair", *id.*, at 796.

In the present case, however, not only is a 15-year delay shocking, see *Rochin v. California* (1952), 342 U.S. 165, 168-172, but it is totally without justification. The State all but admits in its brief at page 15 that the delay was caused by negligence: a "good faith error in judgment on the part of the Detective in charge of the case in 1967 made him believe that there was insufficient evidence to take this case to the County Prosecutor".[10] The delay was not an occasion for collecting additional evidence.[11] From all that appears no investigation was going on at all until the final year of the 15-year period. It would be unconscionable to allow the State to nullify the effect of its delay by allocation of the fault to one of its parts (the police) in order to absolve the other (the prosecution). The parts are one in assessing the responsibility of the State.

In addition, the defendant has demonstrated substantial prejudice due to (1) loss of evidence—tape re-

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9. The majority conceded there was "no evidence concerning the reasons for the delay in the record", *id.*

10. See, also, the admission noted by the trial court taken from the State's trial brief:

> " 'It appears that there was in 1967, at least a police error in judgment as to whether this case should have been submitted to the prosecutor's office. It never was.' " (Finding of the Court, p. 9-10)

11. The State makes much of the fact that in the year preceding the indictment the defendant's blood type was discovered. The court below found that this information was always available to the State (Finding of the Court, p. 8). The State could have discovered the defendant's blood type anytime after 1966. See *Schmerber v. California* (1966), 384 U.S. 757, 759-765.

corded interviews of witnesses and the defendant made by the Lakewood police during the original investigation were destroyed (Tr. 6-7); (2) death of witnesses—one Dr. Catalano, to whom the defendant allegedly went for treatment to an injury sustained in a fight with Tietjen, died several years after 1967; and Larry Cassano, an original suspect in the case and an acquaintance of the defendant, died in 1976 (Tr. 11-12); and (3) haziness of memory—in 1967, a taxi driver identified the defendant from a photograph; 15 years later he is unable to say whether the person he identified is the same person who rode in his cab (Tr. 10-11).

Under all the circumstances, the delayed indictment offends due process. For it is fundamentally unfair.

B.

In *State v. Meeker* (1971), 26 Ohio St. 2d 9, the court considered whether under both the state[12] and federal speedy trial guarantees, pre-indictment delay ought to be considered. The court found that it should, *id.*, at 14-17. *United States v. Marion* and *United States v. Lovasco* must, of course, be considered as overruling the federal speedy trial component of *Meeker*. They leave intact, however, the point of state constitutional law.

Later cases lend credence to the continuing vitality of *Meeker*, see, *State v. Stapleton* (1975), 41 Ohio App. 2d 219, 222-223; *State v. Thomas*, No. 40373 (8th App. Dist. Ohio, Dec. 6, 1979), unreported, at 3-4; and until overruled, the decision stands.

In *Barker v. Wingo* (1972), 407 U.S. 514, 530, the Supreme Court suggested four factors a court should take into

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12. See, Ohio Constitution, Sec. 10, Art. I.

consideration when weighing speedy trial claims. Three are relevant to the present case:[13] (1) Length of delay—here, 15 years; (2) reason for the delay—here, negligence; and (3) prejudice to the defendant—quite probably substantial although no one can know what the dead men might have said in an expeditious trial. The cab driver has a demonstrated diminution of memory and police tapes have been destroyed.

Based on discrete state considerations comparable to, but independent of, those in *Barker*, the defendant was denied a speedy trial in violation of Section 10, Article 1 of the Ohio Constitution.

Assignment of Error No. II is without merit.

IV.

The judgment is affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

MARKUS, J., (see Concurring Opinion attached)

NAHRA, J., Concur

/s/ JACK G. DAY
Presiding Judge

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13. The fourth, the defendant's assertion to his right to a speedy trial, has no relevance in the pre-indictment delay situation, see *State v. Thomas, supra*, at 4, n.2.

Nos. 47305 & 47306

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO,
Plaintiff-Appellant,

vs.

KATHERINE DRUMMOND LUCK,
Defendant-Appellee.

CONCURRING OPINION

MARKUS, J., Concurring:

In my view, the central question for this appeal is the admissibility of defendant's statements at the Lakewood police station. If any significant part of those statements are admissible, the state has recently acquired important additional evidence which was unavailable earlier through due diligence. In that event, the defendant has not been denied a speedy trial or due process by this prosecution. Without any significant part of those statements, the state has no new evidence which was unavailable long ago, so the prosecution would be barred by those constitutional guarantees in the present circumstances.

A.

Under federal constitutional standards, unreasonable delay in asserting charges violates due process. *Barker v. Wingo* (1972), 407 U.S. 514, 530; *United States v. Lovasco* (1977), 431 U.S. 783, 789-797. Delay prior to the formal

charge by indictment or otherwise does not deny the right to a speedy trial. *United States v. Marion* (1971), 404 U.S. 307, 313-325; *United States v. Lovasco, supra,* at 787-789. That right concerns delay after the formal charge.

The Ohio Supreme Court ruled that unreasonable pre-indictment delay can violate speedy trial guarantees in both the state and the federal constitution. *State v. Meeker* (1971), 26 Ohio St. 2d 9, syl. 1-3. However, that decision preceded federal Supreme Court decisions which exclude pre-indictment delay from any determinations whether the federal speedy trial guarantee was violated. *United States v. Marion, supra; United States v. Lovasco, supra.*

The decision in *State v. Meeker* appears to treat the state and federal constitutional language as equivalent for this purpose. See 26 Ohio St. 2d 9, at 12-18. The Ohio Supreme Court made no separate explanation of the standards established by the Ohio Constitution. The same reliance on the two constitutions without any stated distinction appeared in later Ohio decisions. *State v. Stapleton* (1974), 41 Ohio App. 2d 219, 222; *State v. Thomas* (Dec. 6, 1979), Cuyahoga App. No. 40373, slip opinion 3-6. Those later Ohio cases make no mention that the federal Supreme Court rejected any application of the federal speedy trial right to pre-indictment delay.

I conclude that both the federal and the state constitutions preclude reliance on speedy trial guarantees to challenge pre-indictment delays. However, both constitutions afford protection against unreasonable delays which violate due process. Ordinarily, pre-indictment delay is controlled by statutes of limitations, but Ohio has no such statute for murder prosecutions. R.C. 2901.13. Due process guarantees serve a limited function in restraining oppressively

delayed prosecutions. *United States v. Lovasco, supra,* at 789-790. The test for such delays is adequately expressed in *Barker v. Wingo, supra,* at 530. For this case, the relevant factors are the length of delay, the reason for delay, and prejudice to the accused.

The fifteen-year delay was not attributable to continuing investigation. Cf. *State v. Lovasco, supra.* In fact, the investigation lay dormant for almost the entirety of that interval. The prejudice to this accused is not illusory or speculative, even though it is not dramatic. If the delayed charge resulted from the discovery of important new evidence which was unavailable with reasonable diligence at an earlier time, it would be justified. The state's recent knowledge of the accused's blood type will not suffice to justify an otherwise constitutionally tardy prosecution. A reasonably diligent investigation would have produced that blood type within a short time after the offense involved here. Further, knowledge of the accused's blood type is a relatively weak link in the chain of evidence for this prosecution. Many persons have the same blood type.

Therefore, I would conclude that due process precludes this prosecution unless some more significant new evidence surfaced recently. A legally admissible confession by the accused would constitute important evidence of guilt. If the state acquired such a confession recently, that circumstance would overbalance the limited prejudice to the accused from the prolonged delay.

The fact that such a confession post-dated the indictment should not change the result. Due process prohibits fundamentally unfair prosecutions. Any evidence discovered before the defendant challenges the legality of the prosecution has relevance to its propriety. Delay in

making the formal charge should not prevent a constitutionally permissible prosecution, if the state can justify the late prosecution when it is challenged. However, for the reasons stated below, I believe the purported confession was properly suppressed. Consequently no legally admissible confession or other new evidence excuses the state's delay.

B.

Defendant's Sixth Amendment right to counsel has significance here to the protection of her Fifth Amendment right against self-incrimination. Without access to counsel an accused may lack an appreciation of the right to remain silent during custodial interrogation. The right to counsel, who can assist an accused in deciding whether to respond, has critical importance for post-indictment interrogation. Cf. *Massiah v. United States* (1964), 377 U.S. 201, 205-206.

However, neither the Sixth Amendment, nor the Fifth Amendment rights it serves to implement, have application to statements volunteered by an accused. See *Miranda v. Arizona* (1966), 384 U.S. 468, at 478; *State v. Perry* (1968), 14 Ohio St. 2d 256, at 261. Thus, interference with an accused's right to counsel does not by itself preclude use of an accused's statement which is volunteered without interrogation or its equivalent. Cf. *Rhode Island v. Innis* (1980), 446 U.S. 291.

Indeed, an accused who invokes the right to counsel and thereby forecloses interrogation can subsequently initiate communication and waive the previously invoked right to counsel. In that event, custodial interrogation is permissible, and the resulting statement is admissible. *Oregon v. Bradshaw* (1983), 103 S.Ct. 2830.

In this case, the evidence demonstrates that the defendant initiated the communication without any police instigation. However, the evidence here shows that the accused's significant statements followed conduct by the officer which was the equivalent of custodial interrogation. Cf. *Brewer v. Williams* (1977), 430 U.S. 387, 399-400. The detective chose not to disclose efforts by defendant's counsel to reach her and assured her counsel that he would not interrogate her. That conduct significantly interfered with the accused's right to assistance from her counsel. It rendered inadmissible her responses to interrogation, despite her oral and written waivers of counsel, since those waivers resulted when the accused had been deprived of legal assistance which might well have caused her to exercise her right to remain silent.

Therefore, I would overrule the state's assigned errors.

ORDER OF THE COURT OF COMMON PLEAS

(Dated August 4, 1983)

Case No. CR-183735

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,
Plaintiff,

vs.

KATHERINE DRUMMOND LUCK,
Defendant.

ORDER

JAMES F. KILCOYNE, *J.*:

This matter cames before this Court upon a Motion to Suppress Statements based upon denial of the accused's constitutional right to the effective assistance of counsel. An evidentiary hearing was had on July 19, 1983, at which time the defendant was represented by Mr. Gerald S. Gold and the State was represented by Assistant County Prosecutor Carmen Marino.

Upon careful consideration of the testimony, the exhibits, the legal arguments and the controlling case law, the Court finds as follows:

> . . . Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indict-

ment, information, or arraignment." *Brewer v. Williams,* 430 U.S. 387, 398 (1977).

Defendant Luck was arrested following her indictment on March 16, 1983 by the Lakewood Police. Before they left her home, Mrs. Luck contacted her husband and asked him to get an attorney. At the police station, when she was being "processed", Mrs. Luck signed an Advice of Rights form, as well as the waiver of her *Miranda* rights. The testimony shows that the defendant did wish to talk to someone about the case. At approximately 9:05 p.m., after being advised of her rights once again, Mrs. Luck began her conversation with Detective Holmok which eventually culminated in a confession.

The evidence further showed that Attorney Michael Duff was retained on the night of March 16, 1983 by Mr. Luck to represent his wife. Attorney Duff called the Lakewood Police to find out about Mrs. Luck's bond. He spoke to Detective Holmok and asked him not to question Mrs. Luck. He also asked to speak to his client but he was told he could not since she was in lock-up. Attorney Duff made five documented calls that night: (1) 8:13 p.m. one minute; (2) 8:14 p.m.—five minutes; (3) 8:35 p.m.—three minutes; (4) 8:41 p.m.—three minutes; and (5) 10:22 p.m.—two minutes.

At the time of his last phone call, Mr. Duff was not informed that his client was making a statement. In addition, Detective Holmok never told Mrs. Luck that she had an attorney. She discovered that for herself when she called her husband near the end of her talk with Detective Holmok.

Since this was a post-indictment custodial interrogation, Defendant Luck was entitled to the assistance of an

attorney. This right can be waived, but the waiver must be clearly voluntary, knowing and intelligent.

The State's argument that this was a "conversation" and not an "interrogation" is untenable. The defendant was placed in coercive surroundings and was drawn a diagram showing two roads—one road where the police would help her, the other where they would not. She was encouraged to unburden herself and to verify Detective Holmok's presentation of the 1967 events.

The Court concedes that Mrs. Luck was anxious to talk. However, this Court can never know what Defendant Luck would have done if she knew that she had an attorney or knew that her attorney advised her against giving any statements.

At 9:05 p.m., when the statement began, Detective Holmok knew that Mr. Duff represented Mrs. Luck, yet he withheld that information. It is also unusual that there is no record of Attorney Duff's calls, despite the practice of taping incoming calls and retaining them for thirty days, and after a specific written request that they be saved.

Viewing the entirety of these circumstances, the Court concludes that Defendant Luck was denied the assistance of counsel and that she did not knowingly, intelligently and voluntarily waive her rights.

Therefore, Defendant's Motion to Suppress Statements is granted.

/s/ JAMES F. KILCOYNE
Judge

ORDER OF THE COURT OF COMMON PLEAS

(Dated August 4, 1983)

Case No. CR-183735

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,
Plaintiff,

vs.

KATHERINE DRUMMOND LUCK,
Defendant.

ORDER

JAMES F. KILCOYNE, J.:

This matter comes before this Court upon a Motion to Dismiss the Indictment based upon unconstitutional denial of speedy trial and due process rights. An evidentiary hearing was had on July 19, 1981, at which time the defendant was represented by Mr. Gerald S. Gold and the State was represented by Assistant County Prosecutor Carmen Marino.

Upon careful consideration of the testimony, the exhibits, the legal arguments and the controlling case law, the Court finds as follows:

Defendant Luck was indicted on March 16, 1983 for the October, 1967 murder of Helen Marie Tietjen while perpetrating or attempting to perpetrate a robbery. The defense contends that the fifteen-year pre-indictment delay has resulted in the loss of physical evidence, the unavailability of at least one witness, and the impairment of the defendant's and witnesses' memories.

A defendant is protected against unwarranted delay between the offense and the time of arrest by Due Process considerations. *United States v. Marion,* 404 U.S. 307 at 324 (1971).

> . . . the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.
>
> Cf. *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963); *Napue v. Illinois,* 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959). (*Id.* at 324).

This Due Process analysis requires an examination of three factors, as outlined in *State of Ohio v. Ronald Future* (Case No. 43540, Cuyahoga County Court of Appeals, Eighth District, December 3, 1981): the length of the delay; the reason for the delay; and the actual prejudice to defendant.

On its face, the fifteen-year time lag offends Due Process considerations. The individuals connected to an incident, as well the concerned citizenry, have a right to expect a reasonable and timely investigation of a crime.

Under the facts presented here, the State has failed to demonstrate that the delay between the event and the formal charge was justified. No new information came to light. The authorities learned Defendant Luck's blood type this year, but that fact was available in 1967 when she was interviewed on at least two occasions. In addition, the testimony of Detective Holmok demonstrated that a hair sample was never requested in 1967. Although

the defendant's statement was made after the indictment was returned and thus, should not even be considered with regard to this motion, the prosecutors argue that it is valuable since Defendant Luck revealed details only someone at the scene would know. Yet, this Court finds that more details were given to her than she provided, and she supplied nothing new or unique. The totality of these circumstances creates a tactical advantage for the prosecutors over the accused. As was pointed out by Judge Wright, in his concurring opinion, in *Nickens v. United States,* 323 F.2d 808 at 813 (1963):

> [W]ith each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors.

The third factor to be scrutinized here is the actual prejudice suffered by the defendant, Katherine Luck. Several of those individuals, who were suspects or who, like Dr. Catalano, could have shed light on the crime, have since died. In 1967-1968, a taxi driver identified Defendant Luck from photographs. However, today he cannot say one way or the other if the photos depict the woman who rode in his cab that day. Most significantly, the Lakewood police officer testified that her tape-recorded interviews with their department have been erased in the intervening fifteen years. In the State's Reply Brief to Defendant's Motion to Dismiss Indictment, Prosecutor Marino makes the following telling admission:

> It appears that there was in 1967, at least a police error in judgment as to whether this case should have been submitted to the prosecutor's office. It never was.

At the oral hearing on this matter, defense counsel specifically asked Detective Holmok if anything happened over the past fifteen years which changed the State's case. The answer was a definitive "NO". Under the circumstances of this case, and given the unjustifiable delay by the police and the prejudicial effect of time on memories and witnesses, the Court hereby finds that Defendant Luck's rights to a fair trial under the Due Process Clause of the Fourteenth Amendment were violated by this prosecution.

Defendant's Motion to Dismiss the Indictment is granted.

/s/ JAMES F. KILCOYNE
Judge

(2)

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No. 84-1251

In the Supreme Court of the United States

October Term, 1984

THE STATE OF OHIO,
Petitioner,

vs.

KATHERINE LUCK,
Respondent.

On Petition for a Writ of Certiorari
To the Ohio Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution are violated if a defendant's ability to receive a fair trial is prejudiced as a result of an unjustifiable delay between the date of the commission of the offense and the commencement of prosecution during which time actual prejudice to the defendant occurs.

2. Whether a defendant in a criminal prosecution is deprived of the right of the assistance of counsel in violation of the Sixth Amendment to the United States Constitution when a police officer elicits statements from the defendant after:

(1) refusing to allow an attorney retained pursuant to the defendant's request, to speak to the defendant on the telephone;

(2) failing to inform the defendant either of the retention or of the attorney's telephone calls to the police station on her behalf; and

(3) assuring the defendant's attorney that the police will not talk to or interrogate the defendant.

3. Whether this Court should grant a petition for a writ of certiorari to review a criminal case which was dismissed based on principles of state constitutional law as well as federal constitutional law.

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OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 15 Ohio St. 3d 150 and is printed in the appendix to the petition at A1. The opinion of the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio is unreported, but is printed in the appendix to the petition at p. A17. The order and opinion of the Cuyahoga County Court of Common Pleas is unreported, but is printed beginning at p. A36 of the appendix to the petition.

JURISDICTION

This Court has discretionary jurisdiction pursuant to 28 U.S.C. 1257(3).

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS AND HISTORY OF THE CASE

On March 15, 1983, fifteen years, four months and twelve days after Helen Tietjen was killed in Lakewood, Ohio, the respondent was secretly indicted and charged with her murder. The following evening, the respondent was arrested and taken to the Lakewood Police Department where she was denied the opportunity to speak with an attorney who had been retained to represent her. While the respondent was being "processed", a policeman deliberately elicited incriminating statements from the respondent concerning Mrs. Tietjen's death.

The trial court granted the respondent's motion to dismiss the indictment because the respondent had been prejudiced in her ability to receive a fair trial as a result of the events that occurred during an unjustifiable fifteen year delay between the date of the offense and the commencement of prosecution. The trial court also granted the respondent's motion to suppress her post-indictment statements on the grounds that the statements had been taken in violation of the respondent's Sixth Amendment right to the assistance of counsel.

The courts below made the following findings of fact:

1. That there was no justification for the delay between the date of the offense and the commence-

ment of prosecution. Although the respondent was one of several suspects who was investigated and interviewed in 1967 and 1968, the police investigation ended in 1968 and no additional evidence of any substance was discovered between that time and the time of the indictment.

2. That the defendant was prejudiced as a result of the unjustifiable delay in that: (1) the deaths of two key witnesses; (2) the fading of memories and the changes of appearances; and (3) the loss of evidence including the destruction of tape recordings made in 1967 and 1968 of potential witnesses and suspects.

3. That the respondent's post-indictment statements to the police were inadmissible as a result of the respondent being denied the assistance of counsel, and as such, the respondent's statement did not constitute new evidence which would justify the prosecution after the fifteen-year delay.

The Ohio Supreme Court succinctly summarized the events which occurred after the respondent's arrest and during the time that her statements were given to the police at pages A3-A5 of the appendix to the petition which reads as follows:

> The police report indicates that while speaking to her husband and later, while being transported to the Lakewood Police Station, Mrs. Luck became physically ill and vomited. Upon her arrival at the police station, Mrs. Luck provided Patrolman Murray of the Lakewood Police Department with basic information for her "booking record," and she signed both an "Advice of Rights-Adult" and "Waiver of Rights."

This "booking procedure" began at approximately 7:10 p.m. and was completed by about 7:30 p.m. Mrs. Luck was then placed in a cell to await further "processing."

At 8:13 p.m., attorney Michael Duff, who had been retained by Mr. Luck, telephoned the Lakewood Police Department. The record reveals that this call lasted for one minute, with subsequent calls occurring as follows: (1) 8:14 p.m.—five minutes, (2) 8:37 p.m.—three minutes, (3) 8:41 p.m.—three minutes, and (4) 10:22 p.m.—two minutes. Apparently, in all but the 8:13 p.m. call, Duff spoke with Detective Holmok. Duff informed Holmok that he was representing Mrs. Luck, and he asked to speak to her. Holmok refused this request on the ground that Luck was "in lock-up" and could not come to the phone. Duff asked Holmok if Mrs. Luck had made any statement, and Holmok said that she had not. Duff also asked the detective to not question Mrs. Luck, and he requested that Mrs. Luck be informed that he had been retained as her lawyer by Mr. Luck. Holmok indicated that Mrs. Luck had not been questioned and he assured Duff that he had no intention of talking to Mrs. Luck.

At approximately the same time that Duff first called the Lakewood Police Station, Holmok began "processing" Mrs. Luck by taking her fingerprints and obtaining a handwriting sample. After "processing," at approximately 9:00 p.m., Mrs. Luck apparently expressed a desire to talk to Holmok; and, after signing both an "Interrogation: Advise [*sic*] of Rights" and "Waiver of Rights," Mrs. Luck began discussing how she came to know Helen Tietjen. At one point Mrs. Luck asked Holmok if he knew what the events were that had led up to Tietjen's death. Holmok said that he thought he knew what had happened, and that he

would write his theory down on a paper and then see if his theory "agreed" with that of Mrs. Luck.

The "conversation" between Mrs. Luck and Holmok continued for approximately five hours, with Holmok at one point drawing a picture of two roads—one of which was a path whereon he could offer her help, the other a path where he could provide no help. Holmok agreed at the hearing on defendant's motion to dismiss that this demonstration was to encourage Mrs. Luck to unburden herself. At no time in this five-hour period did Holmok inform Mrs. Luck that her husband had retained an attorney for her; and, it was not until she had described her role in the death of Tietjen and given what amounted to a full confession that Mrs. Luck called her husband and learned that Duff had been retained as her lawyer. (A3-A5)

Based upon the findings of fact and conclusions of law as outlined above, the Ohio Court of Appeals and the Ohio Supreme Court both unanimously affirmed the judgment of the trial court.

REASONS FOR DENIAL OF THE WRIT

The petition for a writ of certiorari manifests great unhappiness with the judgments of the three courts below, but fails to present any substantial legal issue for this Court's determination and fails to demonstrate any conflict with the decisions of this Court.

The argument that follows reveals that the real source of the petitioner's frustration is the trial court's findings of fact which were adopted by the Ohio Court of Appeals and the Ohio Supreme Court. The judgments of the trial courts inexorably flow from those findings of fact. This Court does not exist for the purpose of reviewing findings of fact or giving losing litigants another hearing, particularly under circumstances in which the outcome will have no effect on any one other than the parties in the case. While respondent can demonstrate (and did demonstrate to the courts below) that the findings of fact in question were clearly correct and abundantly supported by the evidence, such an issue does not warrant this Court's exercise of its discretionary jurisdiction.

ARGUMENT

I. THE OHIO COURTS CORRECTLY HELD THAT A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION ARE VIOLATED IF A DEFENDANT'S ABILITY TO RECEIVE A FAIR TRIAL IS PREJUDICED AS A RESULT OF AN UNJUSTIFIABLE DELAY BETWEEN THE DATE OF THE COMMISSION OF THE OFFENSE AND THE COMMENCEMENT OF PROSECUTION DURING WHICH TIME ACTUAL PREJUDICE TO THE DEFENDANT OCCURS.

The issue is whether the fifteen year delay in the commencement of prosecution caused actual prejudice to the respondent and was unjustified. The rule is that when pre-indictment delay results in actual prejudice to a defendant, there is a due process claim which is "ripe for adjudication". *U.S. v. Marion* (1971), 404 U.S. 307, 324, and *U.S. v. Lovasco* (1977), 431 U.S. 783, 789. In addition, proof of actual prejudice must be viewed in light of the State's reason for the delay and weighted against the evidence which would be admissible against the accused at trial. *U.S. v. Lovasco, supra,* at 789-790, and *U.S. v. MacDonald* (1982), 456 U.S. 1.

In the present case, the courts below found that the respondent had suffered actual prejudice as the result of:

(1) The deaths of two key witnesses, Larry Cassano and Dr. Catalano. Catalano allegedly treated

Luck for an injury to her hand on or around October 30, 1967. Cassano was an acquaintance of the defendant and an original suspect in the Tietjen murder case, who, according to Luck's confession to Holmok on the night of her arrest, was present at Tietjen's apartment at the time that she was killed.

(2) The fading of memories and changes in appearance. Specifically, a taxi driver who identified the defendant in 1967 (from a 1962 photograph) as having been a passenger in his cab on October 30, 1967, is no longer able to identify the person who rode in his cab.

(3) The loss of evidence. All of the tape recorded interviews with potential witnesses and suspects that were compiled by the Lakewood Police Department in 1967-1968 have been destroyed. Transcripts of these interviews do not exist. (A7-A8)

The courts below went on to find that the State's reason for the pre-indictment delay was unjustified and that the other admissible evidence against the respondent failed to outweigh the actual prejudice which the respondent had suffered during the delay. The courts below found that the "police negligence" in failing to have the case reviewed by the county prosecutor's office was an unjustifiable basis for the delay and that the State's evidence had diminished during the fifteen year delay as a result of the death of witnesses, the loss of taped interviews and the fading of memories.

Moreover, the courts below found that the respondent's post-indictment statements were inadmissible because they were obtained in violation of her Sixth Amendment right to the assistance of counsel. Accordingly, the respondent's statements could not be viewed as newly discovered evi-

dence which would override the prejudicial impact of the pre-indictment delay. The Ohio Supreme Court concluded its discussion concerning the inadmissibility of the respondent's statements by saying:

> As set forth in the facts of this case, above, defendant Luck, immediately after her arrest, requested her husband to contact an attorney on her behalf. Holmok, who was one of the arresting officers, was well aware of Mrs. Luck's request when he later accepted Duff's phone calls at the Lakewood Police Station. Holmok told Duff that he could not speak to Mrs. Luck on the phone; and, despite his knowledge of Luck's desire to retain counsel, Holmok deliberately elicited incriminating statements from Luck without telling her that her husband had retained Duff as her attorney.[1] This behavior, when coupled with Holmok's assurances to Duff that he would not talk to or interrogate Mrs. Luck, amounts to active deception that is clearly violative of Luck's right to counsel. (A9)

The Ohio Supreme Court went on to find that there was no justification for the delay in the commencement of prosecution and said:

> Having found actual prejudice to the defendant, we turn to the second part of the test set forth in *United States v. Lovasco, supra,* which requires that there be no justifiable reason for the delay in prosecution that caused this prejudice. On this point, the state contends that it appears that there was, in 1967, at least a police error in judgment as to whether this case should have been submitted to the prosecutor's office. Following this alleged "error in judgment," the Lakewood Police Department ceased its active investigation into Tiejen's death. Fifteen years

later, the prosecutor sought an indictment based upon the same evidence that had been available in 1968.[6] In fact, the deaths of witnesses and the loss of taped interviews had significantly *reduced* the available evidence by the time that the prosecutor sought the indictment of Mrs. Luck.

This court will not assume the role of the prosecutor to determine when there is sufficient evidence to seek an indictment in every case; and we agree with the rationale of *United States v. Lovasco, supra,* at 792, that it would be unwise to adopt a rule requiring the commencement of prosecution whenever there is "sufficient evidence to prove guilt beyond a reasonable doubt." We believe, however, that a delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant, see *United States v. Marion, supra,* or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased. The length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable. (A14-A15)

Accordingly, the Ohio Supreme Court concluded that:

The delay in the commencement of prosecution against Katherine Luck "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.' * * *" *United States v. Lovasco, supra,* at 790 (citations omit-

ted). We find that this delay is unjustifiable, has resulted in actual prejudice to the defendant, and will effectively deprive the defendant of her right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution should this case proceed to trial. (A16)

The Ohio Courts correctly applied due process standards which have been defined by this court. Their judgments should be affirmed.

II. THE OHIO COURTS CORRECTLY HELD THAT A DEFENDANT IN A CRIMINAL PROSECUTION IS DEPRIVED OF THE RIGHT OF THE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN A POLICE OFFICER ELICITS STATEMENTS FROM THE DEFENDANT AFTER:

(1) REFUSING TO ALLOW AN ATTORNEY RETAINED PURSUANT TO THE DEFENDANT'S REQUEST, TO SPEAK TO THE DEFENDANT ON THE TELEPHONE;

(2) FAILING TO INFORM THE DEFENDANT EITHER OF THE RETENTION OR OF THE ATTORNEY'S TELEPHONE CALLS TO THE POLICE STATION ON HER BEHALF; AND

(3) ASSURING THE DEFENDANT'S ATTORNEY THAT THE POLICE WILL NOT TALK TO OR INTERROGATE THE DEFENDANT.

The second issue raised by the petitioner is whether the respondent's post-indictment statements were obtained in violation of her Sixth Amendment right to the assistance

of counsel. The State argues that the respondent volunteered the statements after knowingly, intelligently, and voluntarily waiving her right to the assistance of counsel. The courts did not agree with the petitioner's argument. The Ohio Supreme Court addressed this issue in its decision and said:

> The state argues, in effect, that Holmok's conduct is not relevant to the admissibility of the statements in question because Luck waived her right to counsel both during her "booking" and immediately after her "processing." This argument is without merit. The review required by *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, of "the particular facts and circumstances surrounding * * * [the] case, including the background, experience, and conduct of the accused," reveals that the state has failed to carry its burden of proving that the defendant "knowingly and intelligently" waived her right to counsel. See *Brewer v. Williams* (1977), 430 U.S. 387, at 402-405. (A9-A10)

In its decision, the Ohio Supreme Court included verbatim quotations from the tape recordings made when the respondent signed the first "waiver of rights form" at the time of her booking. (A10-A12) After analyzing the conversation between the respondent and the police officers at the time this waiver form was signed and analyzing the events that occurred thereafter, the Ohio Supreme Court concluded that:

> Mrs. Luck apparently then signed the "Waiver" form and the booking procedure continued. This signature, however, cannot reasonably be construed as a "knowing and intelligent waiver" of her right to counsel. Mrs. Luck was feeling ill and apparently was highly agitated by the events of the previous hour.

Murray's explanation of the import of the "Waiver" form is clearly inadequate, and Mrs. Luck's hesitation in signing the waiver was apparently eased only after Murray advised her that "we're not going to talk to you here anyway. It's just a formality."

Based on the foregoing, it is indisputable that Luck did not knowingly and intelligently waive her right to counsel prior to the first four calls by Duff to the Lakewood Police Station. For this reason, we need not consider whether Mrs. Luck's second "waiver," which occurred at 9:05 p.m. (after Duff's fourth call but before his fifth and final call), was knowingly and intelligently made. We note, however, that Mrs. Luck was kept "in the dark" as to Duff's calls on her behalf. These calls were placed in response to Mrs. Luck's request for counsel, as made through her husband, and it is highly unlikely that *any* waiver made subsequent to the receipt of these calls by the Lakewood Police Department could be considered to be knowing and intelligent. See *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E.2d 560. (A12-A13)

The Ohio courts correctly applied the standards established by this court for determining if a post-indictment statement was obtained as a result of a suspect being denied the right to the assistance of counsel. The judgments of the courts below should not be disturbed.

III. THE OHIO COURTS CORRECTLY HELD THAT A COURT SHOULD GRANT A PETITION FOR A WRIT OF CERTIORARI TO REVIEW A CRIMINAL CASE WHICH WAS DISMISSED BASED ON PRINCIPLES OF STATE CONSTITUTIONAL LAW AS WELL AS FEDERAL CONSTITUTIONAL LAW.

This court should not grant a petition for a writ of certiorari in this case because the indictment was dismissed based on State constitutional law as well as federal constitutional law.

In the present case, the Ohio Supreme Court held in the second syllabi of its decision that the indictment must be dismissed based on the violation of the respondent's right to due process under Section 16, Article I of the Ohio Constitution as well as a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Even if this court were to find that the federal constitutional component of the Ohio Supreme Court's decision was incorrect, the judgment of the Ohio Supreme Court would be unaffected as a result of the court's finding that dismissal of the indictment was maintained pursuant to a provision of the Ohio Constitution. As recent as November 26, 1984, this court denied an application for a writ of certiorari in a case where the Ohio Supreme Court had determined that evidence gathered against an accused probation violator must be suppressed pursuant to Article I, Section 14 of the Ohio Constitution. *State v. Burkholder* (1984), 12 Ohio St. 3d 205, 466 N.E.2d 176, *cert. denied* (Nov. 26, 1984), ... U.S. ....., 53 U.S.L.W. 3404.

In the present case, the petitioner's application for a writ of certiorari is without merit because the decisions

of the courts below were not based exclusively on disputed principles of federal constitutional law. Accordingly, this court should deny the petitioner's application for writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied because the petitioner is simply seeking yet another hearing concerning factual questions which have been decided by the courts below. The petition does not raise questions which this court has not decided on previous occasions. Accordingly, the respondent submits that the petition should be denied.

Respectfully submitted,

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